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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA

10 JENNIFER MEDINA, an individual, ) Civil No. 08cv1252 BAS(RBB)  
11 )  
12 Plaintiff, ) ORDER GRANTING IN PART AND  
13 ) DENYING IN PART PLAINTIFF  
14 v. ) JENNIFER MEDINA'S MOTION TO  
15 ) COMPEL DISCOVERY OF  
16 COUNTY OF SAN DIEGO; et al., ) COUNTY/SHERIFF DEPARTMENT AND  
17 ) CALIFORNIA HIGHWAY PATROL  
18 Defendants. ) DOCUMENTS [ECF NO. 99]  
19 )  
20 ARLENE SUSAN MEDINA, an )  
21 individual; ROBERT LEO MEDINA, )  
22 an individual, )  
23 )  
24 Plaintiffs, )  
25 )  
26 v. )  
27 )  
28 COUNTY OF SAN DIEGO; et al., )  
29 )  
30 Defendants. )

31 On May 2, 2014, Plaintiff Jennifer Medina filed a combined  
32 Motion to Compel Discovery of County/Sheriff Department and  
33 California Highway Patrol Documents [ECF No. 99]. Defendants'  
34 opposition briefs were filed on May 19, 2014 [ECF Nos. 105, 108].  
35 Plaintiff did not file a reply. The hearing on the motion was set  
36 for July 7, 2014. The Court determined the matter to be suitable  
37 for resolution without oral argument, submitted the motion on the  
38 parties' papers pursuant to the Local Civil Rule 7.1(d), and

1 vacated the motion hearing. (Mins., July 1, 2014, ECF No. 115.)  
2 For the following reasons, the Court GRANTS in part and DENIES in  
3 part Plaintiff's Motion to Compel.

#### 4 I. BACKGROUND

5 This civil rights case arises out of a vehicle pursuit and  
6 subsequent shooting death of Robert J. Medina on November 16, 2006.  
7 (Consolidated Compl. 5, ECF No. 57.) Plaintiffs are his widow,  
8 Jennifer Medina, and parents, Robert and Arlene Medina. (Id. at  
9 3.) Robert Medina was a 22-year-old active duty Marine who had  
10 recently returned from a tour of duty in Iraq and suffered from  
11 post-traumatic stress syndrome. (Id. at 5.) At approximately 1:00  
12 a.m. on November 16, 2006, Medina left his home after arguing with  
13 his wife. (Id.) He was observed driving at a slow rate of speed  
14 on Highway I-5 near the City of Oceanside and weaving in his lane.  
15 California Highway Patrol ("CHP") officers attempted to pull him  
16 over on suspicion of driving under the influence. (Id. at 5-6.)  
17 When Medina failed to stop, dispatch was notified and a slow speed  
18 pursuit followed. (Id. at 6-7.)

19 Eventually, at least five patrol cars joined the pursuit.  
20 (Id. at 7.) The pursuit escalated at the intersection of Leucadia  
21 Boulevard and Highway 101 in Encinitas. (Id.) By then, San Diego  
22 County Deputy Sheriff Mark Ritchie intervened in the pursuit and  
23 deployed a spike strip, allegedly without properly coordinating his  
24 actions with the pursuing officers. (Id.) When Medina swerved in  
25 Ritchie's direction to avoid the spike strip, CHP Officer Timothy  
26 Fenton radioed in the situation as an assault with a deadly weapon.  
27 (Id. at 7-8.) Plaintiffs allege that this created a false and  
28 heightened threat alert to other law enforcement officers. (Id. at

1 8.) Ritchie allegedly continued to pursue Medina without proper  
2 radio communication with the CHP officers. (Id.) Another pursuing  
3 officer reported an "assault with a deadly weapon" after Medina  
4 swerved again to avoid another spike strip. (Id.) As a result of  
5 Ritchie's tactics, two CHP patrol vehicles became disabled;  
6 nonetheless, the pursuit continued. (Id.)

7 Plaintiffs allege Fenton engaged in a Pursuit Immobilization  
8 Technique ("PIT") maneuver that added further elements of danger to  
9 an otherwise nonthreatening slow-speed pursuit. (Id. at 8-9.) As  
10 Medina drove past the patrol car, Fenton allegedly told his partner  
11 Martin, "Let's end this. Let's end this." (Id.) As a result of  
12 the PIT maneuver by Fenton, Medina's truck was forced off the road  
13 and up against a chainlink fence in Solana Beach. (Id.) Ritchie  
14 then rammed the front end of the truck with his patrol car to pin  
15 it against the fence. (Id. at 9.) Fenton and Martin blocked the  
16 truck with their vehicle against the right-side passenger side of  
17 the truck. (Id.) Plaintiffs also claim that Medina's truck  
18 abutted a concrete lamp post "which prohibited the truck's movement  
19 to the right and protected officers taking up positions on the  
20 passenger side of the truck." (Id.) Defendant Fenton was seen  
21 standing by his patrol car with his gun drawn and giving commands.  
22 (Id. at 12.)

23 Plaintiffs allege that the truck was pinned by the two patrol  
24 cars and not moving when the officers began firing. (Id. at 14.)  
25 The officers allegedly could see Medina's hands and observed him  
26 unarmed prior to firing their weapons. (Id. at 13.) Defendant  
27 Ritchie allegedly fired eleven rounds while he was in front of  
28 Medina's truck, and fired more rounds after he moved behind his

1 patrol car. (Id. at 14.) Plaintiffs argue that Ritchie was not in  
2 danger of being run over by Medina but still fired directly at him  
3 in an attempt to kill Medina. (Id. at 15.) Plaintiffs allege that  
4 Defendants Fenton, CHP Officer Leo Nava, and Deputy Sheriff Karla  
5 Taft also fired shots at Medina's truck. (Id.) In total, the  
6 officers fired thirty-seven rounds. (Id. at 16.) Medina was alive  
7 when he was pulled from his truck but died shortly after the  
8 paramedics arrived at the scene. (Id.)

9 On the basis of these allegations, Plaintiffs claim that  
10 Defendants CHP Officers Leo Nava and Tim Fenton and San Diego  
11 Sheriff's Department Deputies Mark Ritchie and Karla Taft used  
12 excessive force and engaged in unlawful policies, customs, or  
13 habits, in violation of Plaintiffs' and Medina's constitutional  
14 rights. Specifically, Plaintiffs allege Defendants used  
15 "unnecessary, unjustified excessive force" when they shot and  
16 killed Medina in violation of his constitutional rights. (Id. at  
17 17.) This, according to the consolidated complaint, constituted an  
18 unlawful seizure in violation of the Fourth Amendment. (Id.)

19 The following claims presently remain in the case: (1)  
20 Jennifer Medina's claim for excessive force in violation of  
21 Medina's rights under the Fourth Amendment against Taft, Ritchie,  
22 Nava, and Fenton; (2) Jennifer Medina's claim for loss of  
23 companionship in violation of her rights under the Fourteenth  
24 Amendment as against Ritchie, Nava, and Fenton; (3) Jennifer  
25 Medina's claim pursuant to Monell v. Dep't of Soc. Servs. of New  
26 York, 436 U.S. 658 (1978), for unlawful policies, customs, or  
27 habits against the County of San Diego; and (4) Medina's parents'  
28 claim for excessive force in violation of the right of association

1 under the Fourteenth Amendment as against Ritchie, Nava, and  
2 Fenton.

3 **II. DISCUSSION**

4 Plaintiff Jennifer Medina moves to compel Defendant County of  
5 San Diego and Defendants Nava and Fenton to produce six categories  
6 of documents<sup>1</sup> relating to each of the individual Defendants: (1)  
7 performance evaluations and training records; (2) "fitness for  
8 duty" evaluations and "return to work" reports; (3) internal  
9 affairs reports and investigations of other incidents or  
10 complaints; (4) discipline, reprimand or remedial training records;  
11 (5) Civil Service Commission records; and (6) Critical Incident  
12 Review Board and CHP investigative records and reports. (Pl.'s  
13 Mot. Compel Attach. #1 Mem. P. & A. 2-3, ECF No. 99.)

14 The documents pertaining to Deputies Ritchie and Taft were  
15 requested in document requests addressed to Defendant County of San  
16 Diego. (Id. Attach. #2 Decl. Acosta 2.) For Defendants Fenton and  
17 Nava, the requested items are described in requests for production  
18 served on these two Defendants. (Id.) In their oppositions, the  
19 responding Defendants opposed disclosure, claiming the documents  
20 are shielded by the official information privilege, are subject to  
21 privacy rights, or seek irrelevant information. (Def. San Diego  
22 Cnty.'s Opp'n 2, 4, ECF No. 108; Joint Opp'n Defs. Nava & Fenton 5,  
23 ECF No. 105.)

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28 <sup>1</sup> Plaintiff's motion involves thirty-six document requests.

1           **A. Legal Standards**

2                   **1. Relevance**

3           The scope of discovery under the Federal Rules of Civil  
4 Procedure is broad. See, e.g., Kelly v. City of San Jose, 114  
5 F.R.D. 653, 668 (N.D. Cal. 1987). Federal Rule of Civil Procedure  
6 26 states:

7                   Parties may obtain discovery regarding any  
8 nonprivileged matter that is relevant to any party's  
9 claim or defense--including the existence, description,  
10 nature, custody, condition, and location of any documents  
11 or other tangible things and the identity and location of  
12 persons who know of any discoverable matter. For good  
13 cause, the court may order discovery of any matter  
relevant to the subject matter involved in the action.  
Relevant information need not be admissible at the trial  
if the discovery appears reasonably calculated to lead to  
the discovery of admissible evidence. All discovery is  
subject to the limitations imposed by Rule 26(b)(2)(C).

14 Fed. R. Civ. P. 26(b)(1). "The party who resists discovery has the  
15 burden to show that discovery should not be allowed, and has the  
16 burden of clarifying, explaining, and supporting its objections."  
17 Oakes v. Halvorsen Marine Ltd., 179 F.R.D. 281, 283 (C.D. Cal.  
18 1998).

19           "[I]n the context of civil rights excessive force cases  
20 against police departments, plaintiffs may suffer great  
21 difficulties if courts impose demanding relevancy standards on  
22 them." Soto v. City of Concord, 162 F.R.D. 603, 610 (N.D. Cal.  
23 1995) (citing Kelly, 114 F.R.D. at 667-68). Thus, "it should be  
24 'sufficient for a plaintiff to show how information of the kind  
25 that is likely to be in the files could lead to admissible  
26 evidence.'" Id. Courts have found performance evaluations  
27 relevant to excessive force claims. Id. at 615; Hampton v. City of  
28 San Diego, 147 F.R.D. 227, 229 (S.D. Cal. 1993). Also, performance

1 evaluation records proving the police department had notice or  
2 ratified the officers' actions may be relevant to show unlawful  
3 policies, customs, or habits as part of Plaintiffs' Monell claim.  
4 See Hampton, 147 F.R.D. at 229.

## 5                   2. Official information privilege

6           "Federal common law recognizes a qualified privilege for  
7 official information." Sanchez v. City of Santa Ana, 936 F.2d  
8 1027, 1033 (9th Cir. 1990) (citing Kerr v. United States Dist. Ct.  
9 for the N. Dist. of Cal., 511 F.2d 192, 198 (9th Cir. 1975)). The  
10 discoverability of official documents should be determined under  
11 the "balancing approach that is moderately pre-weighted in favor of  
12 disclosure." Kelly, 114 F.R.D. at 661. The party asserting the  
13 privilege must properly invoke the privilege by making a  
14 "substantial threshold showing." Id. at 669.

15           The party must file an objection and submit a declaration or  
16 affidavit from a responsible official with personal knowledge of  
17 the matters attested to by the official. Id. The affidavit or  
18 declaration must include (1) an affirmation that the agency has  
19 generated or collected the requested material and that it has  
20 maintained its confidentiality, (2) a statement that the material  
21 has been personally reviewed by the official, (3) a description of  
22 the governmental or privacy interests that would be threatened by  
23 disclosure of the material to the plaintiff or plaintiff's  
24 attorney, (4) a description of how disclosure under a protective  
25 order would create a substantial risk of harm to those interests,  
26 and (5) a projection of the harm to the threatened interest or  
27 interests if disclosure were made. Id. at 670. Requiring the  
28 defendant to make a "substantial threshold showing" allows the

1 plaintiff to assess the defendant's privilege assertions and decide  
2 whether they should be challenged. Id.

3 If a plaintiff challenges defendant's invocation of the  
4 official information privilege, the court "must weigh the potential  
5 benefits of disclosure against the potential disadvantages" to  
6 determine whether the privilege applies. Sanchez, 936 F.2d at  
7 1033-34. Courts consider the following factors when balancing the  
8 interests of the parties in the context of an official information  
9 privilege claim:

10 (1) The extent to which disclosure will thwart  
11 governmental processes by discouraging citizens from  
giving the government information.

12 (2) The impact upon persons who have given  
13 information of having their identities disclosed.

14 (3) The degree to which government self-evaluation  
and consequent program improvement will be chilled by  
15 disclosure.

16 (4) Whether the information sought is factual data  
or evaluative summary.

17 (5) Whether the party seeking the discovery is an  
18 actual or potential defendant in any criminal proceeding  
either pending or reasonably likely to follow from the  
incident in question.

19 (6) Whether the police investigation has been  
20 completed.

21 (7) Whether any interdepartmental disciplinary  
22 proceedings have arisen or may arise from the  
investigation.

23 (8) Whether the plaintiff's suit is non-frivolous  
24 and brought in good faith.

25 (9) Whether the information sought is available  
through other discovery or from other sources.

26 (10) The importance of the information sought to  
27 the plaintiff's case.  
28



1 Kelly, 114 F.R.D. at 663 (citing Frankenhauser v. Rizzo, 59 F.R.D.  
2 339 (E.D. Pa. 1973)). "If the court concludes, based on this  
3 review [of the affidavit and both parties' submissions], that  
4 defendants' submissions are not sufficient to meet its threshold  
5 burdens, the court will order disclosure of the material." Id. at  
6 671; see also Hampton, 147 F.R.D. at 231. But if the defendants'  
7 submissions are sufficient to meet the threshold burden, the court  
8 may order supplemental briefing and conduct an in camera review of  
9 the withheld documents to decide whether they should be produced.  
10 See Kelly, 114 F.R.D. at 671.

### 11 3. Privacy

12 With respect to privacy rights, federal courts recognize a  
13 constitutionally-based right of privacy that may be asserted in  
14 response to discovery requests. Soto, 162 F.R.D. at 616. The  
15 resolution of a party's privacy objection involves balancing the  
16 need for the information sought against the privacy right asserted.  
17 Id. (citing Perry v. State Farm Fire & Cas. Co., 734 F.2d 1441,  
18 1447 (11th Cir. 1984)). "In the context of the disclosure of  
19 police files, courts have recognized that privacy rights are not  
20 inconsequential." Soto, 162 F.R.D. at 616. "[F]ederal courts  
21 generally should give some weight to privacy rights that are  
22 protected by state constitutions or state statutes." Kelly, 114  
23 F.R.D. at 656. "However, these privacy interests must be balanced  
24 against the great weight afforded to federal law in civil rights  
25 cases against police departments." Soto, 162 F.R.D. at 616.

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**B. Document Requests to Defendant San Diego County**

1. Performance evaluations and training records  
(document requests 10, 11, 12, & 13)

In her request for production of documents served on Defendant County of San Diego, Plaintiff seeks performance evaluations for Defendants Ritchie (request number ten) and Taft (request number eleven) for the years 1996 through 2006. (Pl.'s Mot. Compel Attach. #2 Decl. Acosta Ex. 2, at 4, ECF No. 99.) Plaintiff also requests "[a]ll records relating to training received . . . and courses attended . . . for the years 1996 through 2006, including but not limited to current P.O.S.T. certificate, status of mandatory P.O.S.T. training, firearms and qualification dates, scores and remediation" for the years 1996 through 2006 for Ritchie (request number twelve) and Taft (request number thirteen). (*Id.*)

In response to these requests, Defendant County stated:

Responding Party objects on the grounds that personnel materials are protected from disclosure because they contain information pertaining to remedial measures and disciplinary recommendations; they are protected from disclosure by the deliberative process, self-critical analysis, required reports, and official information privileges. Disclosure of personnel, medical, and similar files is an unwarranted invasion of privacy under Penal Code section 832.8(f), CA Constitution, Article 1, Section 1; 5 U.S.C. 552a, and the Freedom of Information Act. They are protected from disclosure under the Federal Privacy Act. They are records compiled [sic] for law enforcement purposes which are exempt from disclosure. They are privileged materials subject to disclosure only under CA Penal Code § 832.7 and Evidence Code § 1043. The material is irrelevant to the subject matter of this action and is not reasonably calculated to lead to the discovery of admissible evidence. Responsive documents will only be released pursuant to a court order. Subject to and without waiving said objection, Responding Party responds as follows: See privilege log and declarations concerning the privilege log produced herewith.

1 (Id. Ex. 3, at 9-12.<sup>2</sup>) For Deputy Ritchie, Defendant San Diego  
 2 County identified the following files: (1) a personnel file, (2)  
 3 internal affairs file, (3) internal affairs file no. 2012-150.1,  
 4 (4) internal affairs file no. 2007-008.2, (5) personnel file - post  
 5 certificate(s), (6) personnel file - CIRB, and (7) personnel file -  
 6 worker's comp. (Id. Ex. 4, at 1-7, 12-13.) For Deputy Taft, the  
 7 County identified four files: (1) a personnel file, (2) internal  
 8 affairs file, (3) personnel file - post certificate(s), and (4)  
 9 personnel file - CIRB. (Id. at 8-13.) Each listed file also  
 10 includes a brief description of the documents contained in the file  
 11 and identifies the parties asserting claims of privilege. (Id. at  
 12 1-13.)

13 A motion to compel may be brought where responses to Rule 34  
 14 requests for production are insufficient. See Fed. R. Civ. P.  
 15 37(a)(3)(B)(iv). When the discovery sought appears relevant on its  
 16 face, "[t]he party resisting discovery bears the burden of  
 17 establishing lack of relevance by demonstrating that the requested  
 18 discovery either does not come within the broad scope of relevance  
 19 or is of such marginal relevance that the potential harm occasioned  
 20 by discovery would outweigh the ordinary presumption in favor of  
 21 broad disclosure.'" Pulsecard, Inc. v. Discover Card Servs., Inc.,  
 22 168 F.R.D. 295, 309 (D. Kan. 1996) (citation omitted).

23 Plaintiff argues in her Motion to Compel that performance  
 24 evaluations and training records should be produced because they  
 25 are relevant and typically ordered disclosed in civil rights cases  
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27 <sup>2</sup> Defendant County gave the same response to all four  
 28 requests.

1 alleging excessive force, especially where plaintiffs also bring a  
2 Monell claim. (Pl.'s Mot. Compel Attach. #1 Mem. P. & A. 8, ECF  
3 No. 99.) Defendant opposes the Motion, contending that the  
4 requested information is protected by the official information  
5 privilege and is not relevant to the litigation. (Def. San Diego  
6 Cnty.'s Opp'n 2, 4, ECF No. 108.) It is well established that  
7 police personnel records are "relevant and discoverable" in § 1983  
8 cases. Green v. Baca, 226 F.R.D. 624, 644 (C.D. Cal. 2005)  
9 (citations omitted); Soto, 162 F.R.D. at 614-15. This includes any  
10 performance evaluations of Defendants by superiors. See Unger v.  
11 Cohen, 125 F.R.D. 67, 70 (S.D.N.Y. 1989) (finding such information  
12 to be "clearly relevant" in a § 1983 action arising out of alleged  
13 on-duty conduct).

14 Defendant County submitted declarations from Lieutenant  
15 Christine Harvel, commanding officer of the internal affairs  
16 division, and Captain Anthony Ray, commander of the personnel  
17 division of the San Diego County Sheriff's Department. (Def. San  
18 Diego Cnty.'s Opp'n Attach. #1 Decl. Harvel, ECF No. 108; id.  
19 Attach. #2 Decl. Ray.) Lieutenant Harvel believes that if the  
20 records of internal investigations are "sought, disclosed and used  
21 for other purposes, the ability of [Internal Affairs] to conduct a  
22 fair and thorough administrative investigations is undermined and  
23 impaired . . . ." (Def. San Diego Cnty.'s Opp'n Attach. #1 Decl.  
24 Harvel 2, ECF No. 108.) Harvel also cautioned that  
25 "[i]ndiscriminate disclosure and uncontrolled dissemination of  
26 confidential records" can potentially discourage individuals from  
27 providing information; disrupt the daily operations of the  
28 department; affect employee morale; consume inordinate time,

1 expense, and resources; and "frustrate the legitimate specific  
2 purposes of compiling and maintaining such records." (Id. at 3.)  
3 Captain Ray's declaration is a verbatim restatement of the same  
4 concerns. (Id. Attach. #2 Decl. Ray 3.)

5 "Questions of evidentiary privilege that arise in the course  
6 of adjudicating federal rights are governed by principles of  
7 federal common law." Green, 226 F.R.D. at 643. The Defendant's  
8 claim that disclosure would frustrate internal investigations lacks  
9 support and has been rejected by other courts. See Soto, 162  
10 F.R.D. at 612 (noting that Kelly "debunks the theory that officers  
11 will be less truthful or forthright in expressing their opinions if  
12 there is a risk of future disclosure[]" and concurring with Kelly's  
13 reasoning) (quoting Kelly, 114 F.R.D. at 665-66); see also Watson  
14 v. Albin, No. C-06-07767 RMW, 2008 WL 1925257, at \*2 (N.D. Cal.  
15 Apr. 30, 2008) ("[Defendant's] arguments that disclosure would  
16 discourage exhaustive internal investigations are unpersuasive.  
17 Courts in this district have previously rejected such claims, and  
18 there is no reason to depart from that reasoning here.") (citing  
19 Kelly, 114 F.R.D. at 672).

20 The Defendant County failed to explain how disclosure of the  
21 relevant documents to Plaintiffs and their attorneys pursuant to a  
22 protective order would harm a significant government or privacy  
23 interest. See Soto, 162 F.R.D. at 613; Kelly, 114 F.R.D. at 670.  
24 The declarations of Lieutenant Harvel and Captain Ray do not  
25 establish that a protective order would be insufficient to protect  
26 significant interests; they fail to project how much harm would be  
27 done to the threatened interests if disclosure under a protective  
28 order were made. Soto, 162 F.R.D. at 613. Yet, both declarants

1 request that in the event disclosure is ordered, the Court "fashion  
2 a protective order to preclude any disclosure or dissemination of  
3 any records, documents or information ordered disclosed for any  
4 purpose other than the express and specific purpose for which the  
5 Court has ordered such disclosure." (Def. San Diego Cnty.'s Opp'n  
6 Attach. #1 Decl. Harvel 4, ECF No. 108; id. Attach. #2, Decl. Ray  
7 4.)

8       The ten factors identified in Kelly to determine whether a  
9 claim of privilege for official information bars discovery, see  
10 Kelly, 114 F.R.D. at 663, all weigh in favor of disclosure.  
11 Plaintiff's need for the information sought is great. This  
12 information is unlikely to be available from any source other than  
13 the Defendants' records. There is a strong public interest in  
14 uncovering civil rights violations of the type at issue in this  
15 case. Soto, 162 F.R.D. at 617; Kelly, 114 F.R.D. at 667. The  
16 privacy interests asserted with respect to these documents are  
17 outweighed by Plaintiff's need for the information. A protective  
18 order and the redaction of any highly personal information for  
19 which Plaintiff has not shown a need will amply protect privacy  
20 interests. See, e.g., Soto, 162 F.R.D. at 616 (stating that "[a]  
21 carefully drafted protective order could minimize the impact of . .  
22 . disclosure"). Defendant County has not met the threshold burden  
23 for invoking the official information privilege.

24       To the extent the Defendant relies on the privilege set forth  
25 in California Penal Code section 832.7, federal courts do not  
26 recognize section 832.7 as relevant to evaluating discovery  
27 disputes in 42 U.S.C. § 1983 cases. See, e.g., Green, 226  
28 F.R.D. at 643-44; see also Miller v. Pancucci, 141 F.R.D. 292,

1 299 (C.D. Cal. 1992) (finding California rules for discovery  
2 and privileges, including California Evidence Code section 1043,  
3 referenced in sections of California Penal Code, to be  
4 "fundamentally inconsistent" with federal law and the liberal  
5 federal policy on discovery).

6 The Court also rejects Defendant's objections on the ground of  
7 the self-critical analysis privilege, the deliberative process  
8 privilege, and the required reports privilege. The Ninth Circuit  
9 does not recognize the self-critical analysis privilege. Union  
10 Pac. R.R. Co. v. Mower, 219 F.3d 1069, 1076 n.7 (9th Cir. 2000)  
11 (citing Dowling v. Am. Hawaii Cruises, Inc., 971 F.2d 423, 425-26  
12 (9th Cir.1992)); accord Branch v. Umphenour, No. 1:08-CV-01655-AWI-  
13 GSA-PC, 2014 WL 3891813, at \*7 (E.D. Cal. Aug. 7, 2014); Soto, 162  
14 F.R.D. at 611. Furthermore, "the self-critical analysis privilege  
15 is inappropriately invoked by Defendants to shield internal  
16 investigatory documents and witness statements from discovery."  
17 Soto, 162 F.R.D. at 612. Likewise, the application of the  
18 deliberative process privilege is not appropriate in civil rights  
19 cases against police departments. Id. This privilege "should be  
20 invoked only in the context of communications designed to directly  
21 contribute to the formulation of important public policy." Id. It  
22 does not shield from disclosure "'most of the kinds of information  
23 police departments routinely generate.'" Id. (quoting Kelly, 114  
24 F.R.D. at 659). "Both the internal affairs investigations as well  
25 as the records of witness/police officer statements are of the type  
26 that would be routinely generated by Defendants." Id. at 612-13.

27 Defendant also asserts the required reports privilege, which  
28 applies if (1) the subject report is mandated and (2) federal law

provides for the privilege. See Wiener v. NEC Elecs., Inc., 848 F. Supp. 124, 128 (N.D. Cal. 1994). Additionally, the privilege is qualified and can be outweighed by a showing of substantial need. Pittman v. Cnty. of San Diego, Civil No. 09-CV-1952-WQH(WVG), 2010 U.S. Dist. LEXIS 97569, at \*8 (S.D. Cal. Sept. 17, 2010). In any event, the Defendant has not established the second prong for the privilege, and the objection fails. For all these reasons, the Court GRANTS Plaintiff's Motion to Compel Defendant County to produce Deputy Ritchie and Taft's performance evaluations and training records for the time period of 1996 through 2006.

2. Fitness for duty evaluations and return to work reports (document requests 14, 15, 16, & 17)

Plaintiff sought all fitness for duty evaluations for the years 1996 to the present for Defendants Ritchie (request number fourteen) and Taft (request number fifteen). (Pl.'s Mot. Compel Attach. #2 Decl. Acosta Ex. 2, at 4, ECF No. 99.) The County objected, claiming the phrase "fitness for duty" was vague and ambiguous. (Id. Ex. 3, at 12-13.) It also invoked the same deliberative process, self-critical analysis, required reports, and official information privileges. The Defendant claimed that disclosure of medical records is an invasion of privacy, and that these records are not relevant to the action. (Id.)

Medina also requested all "Workers' Compensation permanent and stationary return to work reports" as related to Defendants' employment as San Diego Sheriff Deputies from 1996 to present for Ritchie (request number sixteen) and Taft (request number seventeen). (Pl.'s Mot. Compel Attach. #2 Decl. Acosta Ex. 2, at



1 5, ECF No. 99.) Defendant County opposed these requests on the  
2 grounds of privilege and relevance. (Id. Ex. 3, at 13-15.)

3 Plaintiff moves to compel, arguing that the fitness for duty  
4 evaluations and return to work reports are relevant to Plaintiffs'  
5 claims and necessary for Plaintiffs to prove their case. (Pl.'s  
6 Mot. Compel Attach. #1 Mem. P. & A. 9, ECF No. 99.) Medina argues  
7 that Plaintiffs are entitled to know whether any evaluator was  
8 aware of the Defendants' reckless propensities. Plaintiff also  
9 argues that the records are discoverable to the extent Defendants  
10 might rely on them to prove that they were fit for duty and  
11 justified in the shooting. (Id.) Finally, Medina contends that  
12 the records are neither privileged nor confidential under Jaffee v.  
13 Redmond, 518 U.S. 1 (1996). (Id. at 9-10.)

14 San Diego County opposes the motion, arguing that fitness for  
15 duty and return to work records are protected from disclosure as  
16 private medical records. (Def. San Diego Cnty.'s Opp'n 5, ECF No.  
17 108.) It does not cite any authority to support this assertion,  
18 and fails to address Jaffee.

19 When ruling on a motion to compel, a court "generally  
20 considers only those objections that have been timely asserted in  
21 the initial response to the discovery request and that are  
22 subsequently reasserted and relied upon in response to the motion  
23 to compel." Calderon v. Experian Info. Solutions, Inc., 290 F.R.D.  
24 508, 516 n.4 (D. Idaho 2013) (citation omitted). Because  
25 Defendant's brief does not further address the deliberative  
26 process, self-critical analysis, required reports, and official  
27 information privileges raised in the objections, those objections  
28 are overruled, and the Court will focus on the principal objection,

1 the privacy of medical records. If this objection is a euphemism  
2 for protection under the psychiatrist-patient privilege, it fails.  
3 Disclosure is still required if the Court engages in a balancing of  
4 privacy interests.

5 In Jaffee v. Redmond, the Supreme Court held "that  
6 confidential communications between a licensed psychotherapist and  
7 her patients in the course of diagnosis or treatment are protected  
8 from compelled disclosure under Rule 501 of the Federal Rules of  
9 Evidence." 518 U.S. 1, 15 (1996). This privilege generally  
10 applies only when the results of the evaluations were not disclosed  
11 to third parties. See Phelps v. Coy, 194 F.R.D. 606, 608 & n.2  
12 (S.D. Ohio 2000) (holding that the psychotherapist-patient  
13 privilege did not protect information learned by a psychologist  
14 where she evaluated the officer at the behest of his municipal  
15 employer and disclosed the information to the employer); Kamper v.  
16 Gray, 182 F.R.D. 597, 599 (E.D. Mo. 1998) (psychotherapist-patient  
17 privilege did not apply to communications, reports, notes,  
18 documents, and test scores resulting from county police officers'  
19 counseling sessions with mental health professionals where county  
20 had required officers to undergo psychological evaluations on two  
21 occasions as part of their employment, and evaluation results were  
22 subsequently submitted to employer); Barrett v. Vojtas, 182 F.R.D.  
23 177, 179 (W.D. Pa. 1998) (holding psychotherapist-patient privilege  
24 did not apply to conversations and notes taken during counseling  
25 sessions with psychiatrist and psychologist where officer was  
26 ordered to undergo examinations by them, and both doctors  
27 subsequently submitted reports to borough officials).

28

1 In this case, any documents responsive to this request were  
2 created in the course of the deputies' employment with the County,  
3 and were made part of their personnel files. Because the records  
4 were shared with a third party, their employer, the deputies had no  
5 expectation that their conversations were confidential. Barrett,  
6 182 F.R.D. at 179 ("There would be no reasonable expectation of  
7 confidentiality, and therefore no confidential intent, if a party  
8 to a conversation was aware that the other party may report on the  
9 conversation to a third party."). Defendant's privacy objections  
10 are overruled.

11 The Defendant asserts additional objections. It claims,  
12 "fitness for duty and return to work information is protected from  
13 disclosure under the provisions of the Federal Privacy Act (5  
14 U.S.C. § 5529), and state privacy rights . . . ." (Def. San Diego  
15 Cnty.'s Opp'n 5, ECF No. 108.) It also maintains that disclosure  
16 is "impermissible under the Freedom of Information Act (5 U.S.C.  
17 [§] 552(b)(6)(7))." (Id.)

18 "The [Federal] Privacy Act applies only to 'agencies' as  
19 defined by 5 U.S.C. § 551(1) and 5 U.S.C. § 552(f)(1), and does not  
20 encompass state agencies or bodies." Womack v. Metro. Transit  
21 Sys., Case No. 09cv2679 BTM(NLS), 2011 U.S. Dist. LEXIS 19844, at  
22 \*29 (S.D. Cal. Feb. 28, 2011). The Freedom of Information Act only  
23 applies to federal agencies. Hammerlord v. City of San Diego, Case  
24 No. 11-cv-1564 JLS (NLS), 2012 U.S. Dist. LEXIS 157740, at \*15  
25 (S.D. Cal. Nov. 2, 2012). Finally, federal law, not California  
26 Penal, Civil, and Government Code sections, dictates whether a  
27 particular privilege applies in a § 1983 case. See Rogers v.  
28 Giurbino, 288 F.R.D. 469, 484 (S.D. Cal. 2012). Privacy concerns

1 will be protected by directing the County to produce responsive  
2 documents pursuant to a protective order. Accordingly, the Court  
3 GRANTS Plaintiff's Motion to Compel production of Defendants  
4 Ritchie and Taft's fitness for duty evaluations and return to work  
5 reports for the years 1996 to the present.

6 3. Documents related to the underlying incident  
7 (document request 18)

8 In document request number eighteen, Plaintiff asked Defendant  
9 County to produce all reports, interviews, witness statements,  
10 diagrams, photographs, investigative summaries, or any audio or  
11 visual recording made as a result of any investigation by the San  
12 Diego Sheriff's Department into the shooting death of Robert J.  
13 Medina. (Pl.'s Mot. Compel Attach. #2 Decl. Acosta Ex. 2, at 5,  
14 ECF No. 99.) County objected to this request for production and  
15 repeated its previously rejected objections that information is  
16 protected by deliberative process, self-critical analysis, required  
17 reports, and official information privileges. (Id. Ex. 3, at 15.)  
18 Defendant also referred to its response to Plaintiff's request for  
19 production number one, the privilege log, and the declarations  
20 concerning the privilege log. (Id. at 16.)

21 Plaintiff's document request number one appears to be  
22 substantially similar to request number eighteen. In request  
23 number one, Plaintiff asked for all documents and things comprising  
24 the Homicide Investigation" in possession of the County or San  
25 Diego Sheriff's Department "which relate to the INCIDENT and its  
26 investigation." (Pl.'s Mot. Compel Attach. #2 Decl. Acosta Ex. 2,  
27 at 2, ECF No. 99.) In response, Defendant stated that the  
28 previously produced Homicide Report will be produced again at

1 Plaintiff's expense. (Id. Ex. 3, at 2.) Defendant agreed to  
2 produce photographs, recordings, and audio interviews. (Id. at 3.)  
3 Plaintiff is not moving to compel production pursuant to document  
4 request number one. The Motion to Compel and supporting documents  
5 do not provide sufficient information to allow the Court to  
6 determine how Medina's request number eighteen differs from her  
7 request number one.

8       Nonetheless, the records created in the course of the  
9 investigation into the shooting death of Robert Medina are clearly  
10 relevant to this civil rights action. See Kelly, 114 F.R.D. at  
11 665-66. The information was generated by the San Diego Sheriff's  
12 Department, and it is not otherwise available to Plaintiff. For  
13 the reasons stated above, the Court overrules Defendant's  
14 objections on the basis of deliberative process, self-critical  
15 analysis, and required reports privileges. See Soto, 162 F.R.D. at  
16 611-13; Wiener, 848 F. Supp. at 128.

17       The official information privilege likewise does not apply  
18 because Defendant has not met the threshold burden under Kelly. As  
19 discussed earlier, the declaration of Lieutenant Harvel, commanding  
20 officer of the San Diego Sheriffs Internal Affairs Department,  
21 fails to explain why a protective order would not suffice to  
22 safeguard significant governmental or privacy interests, or to  
23 project how much harm would be done to the threatened interests if  
24 disclosure were made. Soto, 162 F.R.D. at 613; Kelly, 114 F.R.D.  
25 at 670. Plaintiff's Motion to Compel production of documents  
26 identified in request number eighteen to Defendant County is  
27 GRANTED.

28

4. Internal Affairs reports and investigations of other incidents or complaints (document requests 19 & 20)

In document requests nineteen and twenty, Plaintiff seeks citizen complaints relating to false arrest, unlawful detention, unlawful search or seizure, excessive force, improper use of firearm, improper use of lethal force, false reports, false statements, untruthful or other improper procedures by Defendants Ritchie and Taft for the years 1996 to the present. Specifically, document request number nineteen listed the following items:

All reports of complaints made or internal affairs investigations conducted alleging or relating to false arrest, unlawful detention, unlawful search or seizure, excessive force, improper use of firearm, improper use of lethal force, false reports, false statements, untruthfulness or other improper procedures by Defendant MARK RITCHIE for the years 1996 to the present, and the investigation of said complaints, including, but not limited to:

a) the full investigation of each complaint or investigation, including all statements (written, audio or video recordings) of all participants and witnesses;

b) the names, addresses and telephone numbers of the persons who filed the complaints or generated the investigation and any statements (written, audio or video recordings) they provided;

c) the names, address and telephone numbers of all persons, whether law enforcement officers or private persons, who were percipient witnesses to the events which gave rise to the filing of the complaints or generation of the investigation, and any statement (written, audio or video recordings) each such person provided;

d) the written reports of the investigation of these complaints or investigations, including complaints which may have been determined to be unsustainable; and

e) verbatim copies of all other records, reports, notes, photographs and audio or video recordings made as a result of the law enforcement agency's investigation of the complaints.

1           As to all items requested, Plaintiffs request the  
2           information be furnished regardless of the outcome,  
3           disposition or result of the complaint, report or  
4           investigation.

5           (Pl.'s Mot. Compel Attach. #2 Decl. Acosta Ex. 2, at 5-6, ECF No.  
6           99.) Medina sought the same records pertaining to Defendant Taft  
7           in document request number twenty. (Id. at 6-7.)

8           Defendant objected to the requests, again invoking the  
9           deliberative process, self-critical analysis, required reports, and  
10          official information privileges. (Id. Ex. 3, at 17-18.) The  
11          County also claimed the information is irrelevant and protected  
12          from disclosure under privacy laws. (Id.) In opposing Medina's  
13          motion, Defendant argues that "similar act information" cannot be  
14          used to prove any misconduct in this case. It also claims that  
15          "unfinished investigation documentation should not be disclosed  
16          because they are [sic] inherently incomplete and have not been  
17          finally approved for dissemination within the agency." (Def. San  
18          Diego Cnty.'s Opp'n 3, ECF No. 108.)

19          Internal affairs investigations into citizen complaints  
20          against defendants are "presumptively discoverable" where relevant.  
21          Kelly, 11 F.R.D. at 665-66. Records of citizen complaints against  
22          law enforcement involving excessive force are relevant in civil  
23          rights cases. Soto, 162 F.R.D. at 620. These records may be  
24          "crucial to proving [a] [d]efendant's history or pattern of such  
25          behavior." Id. "Information contained in these files may be  
26          relevant on the issues of credibility, notice to the employer,  
27          ratification by the employer and motive of the officers." Hampton,  
28          147 F.R.D. at 229. It may also show "evidence of a continuing  
course of conduct reflecting malicious intent." Id.

1 To the extent Defendant suggests that incomplete investigation  
2 documentation should not be produced, it does not cite any  
3 authority for the proposition that relevant information contained  
4 in citizen complaints is not discoverable until or unless the  
5 agency completes its investigation of the complaint.<sup>3</sup> Plaintiff  
6 argues that any post-incident events must be disclosed because they  
7 are relevant to her claim against the County for maintaining an  
8 unlawful policy of deliberate indifference to the lives and liberty  
9 of the public. (Pl.'s Mot. Compel Attach. #1 Mem. P. & A. 13, ECF  
10 No. 99.) Plaintiff alleged that Defendant San Diego County failed  
11 to adequately train deputies on the constitutionally permissible  
12 use of force, and that deliberate indifference is evidenced by the  
13 failure to change its policy. (Consolidated Compl. 18-19, ECF No.  
14 57.)

15 "[P]ost-event evidence is not only admissible for purposes of  
16 proving the existence of a municipal defendant's policy or custom,  
17 but may be highly probative with respect to that inquiry." Henry  
18 v. Cnty. of Shasta, 132 F.3d 512, 519 (9th Cir. 1997), as amended,  
19 137 F.3d 1372 (9th Cir. 1998). "When a county continues to turn a  
20 blind eye to severe violations of . . . constitutional rights --  
21 despite having received notice of such violations -- a rational  
22 fact finder may properly infer the existence of a previous policy  
23 or custom of deliberate indifference." Id.

24 Defendant's submissions are not enough to satisfy the  
25 threshold burden of showing that privilege applies. "The official  
26

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27 <sup>3</sup> Neither the opposition brief nor the privilege log specifies  
28 which investigations have not been completed.



1 information privilege serves an important purpose, but it does not  
2 automatically apply to all evaluative portions of internal affairs  
3 reports." Carter v. Carlsbad, No. 10cv1072-IEG (BLM), 2011 WL  
4 669227, at \*4 (S.D. Cal. Feb. 15, 2011). As noted before, the  
5 affidavits submitted by Defendant County fail to establish that a  
6 protective order would be insufficient to protect significant  
7 governmental or privacy interests. Soto, 162 F.R.D. at 613. The  
8 Court is not required to conduct an in camera review of documents  
9 where Defendants have not made a sufficient threshold showing that  
10 the records are privileged. Kelly, 114 F.R.D. at 671; see also  
11 Ramirez v. Cnty. of Los Angeles, 231 F.R.D. 407, 410 (C.D. Cal.  
12 2005) ("[T]he court does not believe that it is necessary to  
13 conduct an in camera review of the subject documents because  
14 defendants did not comply with requirements to invoke the official  
15 information privilege.").

16 Plaintiff asserts that the privilege log for documents  
17 pertaining to Defendant Ritchie is incomplete; she compares the  
18 privilege log here with the privilege log in another federal civil  
19 rights case involving Defendant Ritchie. (Compare Pl.'s Mot.  
20 Compel Attach. #1 Mem. P. & A. 4, ECF No. 99, with id. Attach. #2  
21 Decl. Acosta Ex. 2, at 4-7, and id. Ex. 5, at 5-8.) Defendant does  
22 not address this discrepancy. To the extent any descriptive  
23 information responsive to Plaintiff's document request nineteen was  
24 omitted from the privilege log, the privilege log should be  
25 amended. All Defendants are reminded of their duty to supplement  
26 or correct discovery responses that are incomplete or inaccurate.  
27 See Fed. R. Civ. P. 26(e).

28

1 The Defendant's threshold showing is insufficient.  
 2 Furthermore, privacy and governmental interests can be adequately  
 3 safeguarded by a protective order. For these reasons, the Court  
 4 GRANTS Plaintiff's Motion to Compel the production of items  
 5 identified in document requests nineteen and twenty.

6 5. Discipline, reprimand, or remedial training records  
 7 (document requests 21 & 22)

8 Document request number twenty-one seeks the following:

9 [A]ny records of discipline, reprimand or remedial  
 10 training imposed upon defendant MARK RITCHIE as a result  
 11 of the INCIDENT or any other act of false arrest,  
 12 unlawful detention, unlawful search and seizure, use of  
 excessive force, improper use of firearm, improper use of  
 lethal force, false statement, false report or other  
 improper action.

13 (Pl.'s Mot. Compel Attach. #2 Decl. Acosta Ex. 2, at 7, ECF No.  
 14 99.) Document request number twenty-two seeks the same information  
 15 regarding Defendant Taft. (Id. at 8.) The same unsubstantiated  
 16 objections are asserted: the deliberative process, self-critical  
 17 analysis, required reports, and official information privileges.  
 18 (Id. Ex. 3, at 19-20.) Defendant also claimed the information is  
 19 irrelevant and protected from disclosure under privacy laws. (Id.)

20 The information Plaintiff seeks in these two requests is  
 21 relevant for the same reasons outlined above with respect to the  
 22 internal investigations and citizen complaints (requests nineteen  
 23 and twenty). See Hampton, 147 F.R.D. at 229; Soto, 162 F.R.D. at  
 24 614-15. Defendants' discipline records relating to this incident  
 25 are relevant and discoverable. Discipline records that involve  
 26 allegations of false arrest, unlawful detention, unlawful search  
 27 and seizure, use of excessive force, improper use of firearm,  
 28 improper use of lethal force, false statement, and false reporting

are relevant and should be produced. The information "may be crucial to proving [a] [d]efendant's history or pattern of such behavior." Soto, 162 F.R.D. at 620. Records of this type may also be relevant to issues of "credibility, notice to the employer, ratification by the employer and motive of the officers." Hampton, 147 F.R.D. at 229 (finding information regarding other instances of misconduct relevant to the punitive damages claim because it "may lead to evidence of a continuing course of conduct reflecting malicious intent"). Plaintiff's Motion to Compel the production of documents sought in requests twenty-one and twenty-two is GRANTED.

6. Civil Service Commission records (document requests 24 & 25)

In document request twenty-four, Plaintiff seeks "[a]ll documents and files relating in any way to Civil Service Commission proceedings relating in any way to Defendant MARK RITCHIE." (Pl.'s Mot. Compel Attach. #2 Decl. Acosta Ex. 2, at 8, ECF No. 99.) The same request with regard to Defendant Taft is contained in document request twenty-five. (Id.) Defendant again objected to the requests, invoking the deliberative process, self-critical analysis, required reports, and official information privileges. (Id. Ex. 3, at 21-22.) It continues to claim that the information is irrelevant and protected from disclosure under privacy laws, and asserts that "[a]fter a reasonable inquiry and diligent search, there are no documents responsive to this request." (Id.) In opposing Plaintiff's Motion to Compel, Defendant states that it has "no control or possession of records of the Civil Service Commission which is an independent adjudicatory body from Defendants." (Def. San Diego Cnty.'s Opp'n 1 n.1, ECF No. 108.)

1 Federal Rule of Civil Procedure 34 provides that "[a] party  
2 may serve on any other party a request . . . to produce . . . the  
3 following items in the responding party's possession, custody, or  
4 control: any designated documents or electronically stored  
5 information . . . ." Fed. R. Civ. P. 34(a). "Control is defined  
6 as the legal right to obtain documents upon demand." United States  
7 v. Int'l Union of Petrol. & Indus. Workers, AFL-CIO, 870 F.2d 1450,  
8 1452 (9th Cir. 1989). Thus, "[a] party responding to a Rule 34  
9 production request . . . 'is under an affirmative duty to seek that  
10 information reasonably available to [it] from [its] employees,  
11 agents, or others subject to [its] control.'" Gray v. Faulkner,  
12 148 F.R.D. 220, 223 (N.D. Ind. 1992) (citation omitted); see A.  
13 Farber & Partners, Inc. v. Garber, 234 F.R.D. 186, 189 (C.D. Cal.  
14 2006) (same). Thus, a responding party may be required to produce  
15 a document that is not in its possession if the responding party  
16 has a "legal right to obtain the document." Bryant v. Armstrong,  
17 285 F.R.D. 596, 603 (S.D. Cal. 2012) (citation omitted). The  
18 burden of proving that a document is in the possession, custody or  
19 control of a responding party rests on the requesting party. See  
20 Clinton v. California Dept. of Corr., 264 F.R.D. 635, 645 (E.D.  
21 Cal. 2010).

22 Defendant San Diego County's objections to document requests  
23 twenty-four and twenty-five did not state that it lacks control  
24 over the records because the Civil Service Commission is a separate  
25 entity. That objection has been waived. When a party fails to  
26 provide any response or objection to interrogatories or document  
27 requests, courts deem all objections waived and grant a motion to  
28 compel. See Richmark Corp. v. Timber Falling Consultants, 959 F.2d

1 1468, 1473 (9th Cir. 1992) (finding that a party who failed to  
2 timely object to interrogatories and document production requests  
3 waived any objections); 7 James Wm. Moore et al., Moore's Federal  
4 Practice, § 33.174[2], at 33-106, § 34.13[2][a], at 34-56 to  
5 34-56.1 (3d ed. 2012). "It is well established that a failure to  
6 object to discovery requests within the time required constitutes a  
7 waiver of objection." Richmark, 959 F.2d at 1473. Similarly, to  
8 the extent Defendant's claim in opposition to the Motion to Compel  
9 presents a new argument, the objection comes too late. The reason  
10 for requiring timely objections to discovery requests is to give  
11 the propounding party an opportunity to file a motion to compel to  
12 address inadequate objections.

13 In this case, even if timely asserted, the objection that the  
14 County lacks control over the documents is not well taken. The  
15 Court takes judicial notice, see Fed. R. Evid. 201(b)(2), that San  
16 Diego County Civil Service Commission is the administrative appeals  
17 body for the San Diego County in personnel matters. County of San  
18 Diego Civil Service Rules, Rule I-Civil Service Commission,  
19 available at [www.sdcounty.ca.gov/civilservice/pdf/csrFull.pdf](http://www.sdcounty.ca.gov/civilservice/pdf/csrFull.pdf). The  
20 Civil Service Commission is also included in the list of  
21 departments on the County of San Diego's public website:  
22 [http://sdpublic.sdcounty.ca.gov/your-county-government/county-depar](http://sdpublic.sdcounty.ca.gov/your-county-government/county-departments/)  
23 [tments/](http://sdpublic.sdcounty.ca.gov/your-county-government/county-departments/). Given this, the Defendant has not convincingly asserted  
24 that it does not have the legal right to obtain the documents from  
25 the Civil Service Commission. See Soto, 162 F.R.D. at 619. The  
26 Motion to Compel further responses is therefore GRANTED as to  
27 requests for production numbers twenty-four and twenty-five.  
28 Defendant is ordered to produce the documents or provide a further

1 response under oath explaining what efforts were made to obtain the  
2 requested documents.

3 7. Critical Incident Review Board records and reports  
4 (document request 26)

5 In request for production number twenty-six, Medina sought all  
6 "Critical Review Reports or similar reports and materials related  
7 to the INCIDENT." (Pl.'s Mot. Compel Attach. #2 Decl. Acosta Ex.  
8 2, at 8, ECF No. 99.) Defendant objected to the request, invoking  
9 the same deliberative process, self-critical analysis, required  
10 reports, and official information privileges. (Id. Ex. 3, at 23.)  
11 It also claimed the information is protected from disclosure under  
12 privacy laws, and that responsive documents will only be released  
13 pursuant to a Court order. (Id.) In the privilege log provided in  
14 connection with the discovery responses, Defendant also indicated  
15 the information is protected by the attorney-client communication  
16 privilege and attorney work product doctrine. (Id. Ex. 4, at 12-  
17 13.)

18 The privilege log identifies three items; two are letters from  
19 R. Faigin to S. Amos described as "CIRB report re: officer involved  
20 shooting re: Robert Medina." (Id. at 13.) The first letter is  
21 dated August 3, 2009, and the second October 14, 2008. The third  
22 document is described as a "sign-in sheet for Encinitas Pre-CIRB  
23 conference" regarding the same incident, and is dated October 14,  
24 2008. (Id.) Defendants County of San Diego, Taft, and Ritchie are  
25 all listed as parties claiming the privileges. (Id.) In the  
26 opposition to Plaintiff's motion, Defendant San Diego County  
27 asserts only that the Critical Incident Review Board ("CIRB")  
28

1 records are protected by the attorney-client communication  
2 privilege. (Def. San Diego Cnty.'s Opp'n 2, 6, ECF No. 108.)

3 The purpose of the attorney-client privilege is "to encourage  
4 full and frank communication between attorneys and their clients."  
5 Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). "'The party  
6 asserting an evidentiary privilege has the burden to demonstrate  
7 that the privilege applies to the information in question.'" Griffith v. Davis, 161 F.R.D. 687, 694 (C.D. Cal. 1995) (quoting  
8 Tornay v. United States, 840 F.2d 1424, 1426 (9th Cir. 1988)).  
9 "'Because it impedes full and free disclosure of the truth, the  
10 attorney-client privilege is strictly construed.'" United States  
11 v. Martin, 278 F.3d 988, 999 (9th Cir. 2002) (quoting Weil v.  
12 Inv./Indicators, Research & Mgmt., Inc., 647 F.2d 18, 24 (9th Cir.  
13 1981)). The privilege "protects only those disclosures necessary  
14 to obtain informed legal advice which might not have been made  
15 absent the privilege." Fisher v. United States, 425 U.S. 391, 403  
16 (1976). It applies "'only when necessary to effectuate its limited  
17 purpose of encouraging complete disclosure by the client.'" Griffith, 161 F.R.D. at 694 (quoting Tornay, 840 F.2d at 1428).

18 The attorney-client communication privilege consists of eight  
19 elements:

- 20 (1) Where legal advice of any kind is sought
- 21 (2) from a professional legal adviser in his capacity as
- 22 such,
- 23 (3) the communications relating to that purpose,
- 24 (4) made in confidence
- 25 (5) by the client,
- 26 (6) are at his instance permanently protected
- (7) from disclosure by himself or by the legal adviser,
- (8) unless the protection be waived.

27 Matter of Fischel, 557 F.2d 209, 211 (9th Cir. 1977). Defendant  
28 failed to establish that the two letters and the sign-in sheet

1 satisfy the attorney-client communication test. First, Defendant  
2 has not submitted any evidence that an attorney-client relationship  
3 existed between San Diego County, Taft, or Ritchie, and either "R.  
4 Faigin" or "S. Amos." Nor has the Defendant shown that the  
5 communications were made in confidence and for the purpose of  
6 seeking legal advice.

7 The privilege typically does not apply to internal police  
8 investigations, such as the critical incident review proceedings at  
9 issue. See Griffith, 161 F.R.D. at 694-97 (stating that statements  
10 made during investigation were not subject to attorney-client  
11 privilege because the officer believed the interview was required  
12 and done, in part, to determine whether police misconduct had  
13 occurred, and thus the interviews were not conducted primarily to  
14 obtain legal advice and were not confidential); accord Gonzalez v.  
15 Municipal Ct., 67 Cal. App. 3d 111, 119-20, 136 Cal. Rptr. 475,  
16 479-80 (Ct. App. 1977) (concluding that statements made to police  
17 internal affairs investigators were not protected by the attorney-  
18 client privilege because the officer knew they could be the basis  
19 for disciplinary action against him and thus were not  
20 confidential).

21 The burden is on the party asserting the attorney-client  
22 privilege to establish that the privilege applies to the requested  
23 documents. Conforto v. Mabus, Case No. 12cv1316-W(BLM), 2014 U.S.  
24 Dist. LEXIS 109970, at \*25 (S.D. Cal. Aug. 8, 2014) (citing Tornay  
25 v. United States, 840 F.2d at 1426). The County did not carry its  
26 burden. Accordingly, the Court finds that the documents are not  
27 protected by the attorney-client privilege.

28



1 Defendant's privilege log also claimed that the CIRB records  
2 are protected by the attorney work product doctrine. (Pl.'s Mot.  
3 Compel Attach. #2 Decl. Acosta Ex. 4, at 13, ECF No. 99.) The  
4 opposition brief, however, does not discuss the attorney work  
5 product doctrine as a ground for objecting to discovery. (See Def.  
6 San Diego Cnty.'s Opp'n 6, ECF No. 108.)

7 When ruling on a motion to compel, a court "generally  
8 considers only those objections that have been timely asserted in  
9 the initial response to the discovery request and that are  
10 subsequently reasserted and relied upon in response to the motion  
11 to compel . . . ." Calderon, 290 F.R.D. at 516 n.4 (citation  
12 omitted). If a party fails to continue to assert an objection in  
13 opposition to a motion to compel, courts deem the objection waived.  
14 See id.

15 Because Defendant did not assert the attorney work product  
16 doctrine in the opposition brief, that objection is waived. It  
17 also fails on the merits. Federal Rule of Civil Procedure 26(b)(3)  
18 states that "[o]rdinarily, a party may not discover documents and  
19 tangible things that are prepared in anticipation of litigation or  
20 for trial by or for another party or its representative (including  
21 the other party's attorney, consultant, surety, indemnitor,  
22 insurer, or agent)." Fed. R. Civ. P. 26(b)(3)(A). Nevertheless,  
23 those materials may be discovered if "(i) they are otherwise  
24 discoverable under Rule 26(b)(1); and (ii) the party shows that it  
25 has substantial need for the materials to prepare its case and  
26 cannot, without undue hardship, obtain their substantial equivalent  
27 by other means." Id. But even when substantial need for work  
28 product has been shown, the Court must still "protect against

1 disclosure of the mental impressions, conclusions, opinions, or  
2 legal theories of a party's attorney or other representative  
3 concerning the litigation." Fed. R. Civ. P. 26(b)(3)(B).

4 The burden is on the party claiming the privilege to establish  
5 that the withheld documents are protected from discovery by the  
6 attorney work product doctrine. See 6 James Wm. Moore et al.,  
7 Moore's Federal Practice, § 26.70[5][a], at 26-454 (3d ed. 2014)  
8 (footnote omitted). "The party seeking work product protection  
9 must establish that the material is a document or tangible thing  
10 prepared in anticipation of litigation for that party." Id. at 26-  
11 454-55 (footnote omitted). "A mere allegation that the work  
12 product rule applies is insufficient to invoke its protection."  
13 Id. at 26-455 (footnote omitted).

14 As discussed above, Defendant failed to submit any evidence  
15 showing the existence of an attorney-client relationship between  
16 San Diego County or Deputies Ritchie and Taft, and S. Amos or R.  
17 Fagin. Also, the Defendant does not show that the two reports  
18 written by S. Amos in connection with the CIRB were "prepared in  
19 anticipation of litigation" as required by Rule 26(b)(3)(A).  
20 Finally, Defendant waived this objection by raising it in the  
21 privilege log but abandoning it in the opposition to Plaintiff's  
22 motion. For these reasons, the CIRB documents are not protected by  
23 the work product doctrine.

24 The records relate to the investigation of the underlying  
25 shooting incident and are clearly relevant to this case. For the  
26 reasons discussed earlier, the deliberative process, self-critical  
27 analysis, required reports, and official information privileges do  
28 not apply to these documents. Accordingly, the Court GRANTS

1 Plaintiff's Motion to Compel production of documents identified in  
2 request twenty-six.

3 **C. California Highway Patrol Defendants**

4 Plaintiff moved to compel multiple discovery responses from  
5 Defendants Nava and Fenton, California Highway Patrol officers.  
6 (Pl.'s Mot. Compel Attach. #1 Mem. P. & A. 2, ECF No. 99.) In  
7 their opposition, Defendants allege that Medina failed to meet and  
8 confer prior to bringing this Motion. (Defs. Nava & Fenton's Joint  
9 Opp'n 4, ECF No. 105.)

10 According to the Civil Local Rules for the Southern District  
11 of California, "The court will entertain no motion pursuant to  
12 Rules 26 through 37, Fed. R. Civ. P., unless counsel shall have  
13 previously met and conferred concerning all disputed issues." S.D.  
14 Cal. Civ. R. 26.1(a). A court can deny a motion to compel solely  
15 because of a party's failure to meet and confer prior to filing the  
16 motion. Scheinuck v. Sepulveda, No. C 09-0727 WHA (PR), 2010 U.S.  
17 Dist. LEXIS 136529, at \*3-4 (N.D. Cal. Dec. 15, 2010); see Shaw v.  
18 Cnty. of San Diego, No. 06-CV-2680-IEG (POR), 2008 U.S. Dist. LEXIS  
19 80508, at \*3-4 (S.D. Cal. Oct. 9, 2008) (denying plaintiff's motion  
20 to compel for failing to meet and confer). Nonetheless, courts may  
21 still decide a motion on the merits despite a failure to meet and  
22 confer. See Marine Grp., LLC v. Marine Travelift, Inc., No.  
23 10cv846-BTM (KSC), 2012 U.S. Dist. LEXIS 49064, at \*6-7 (S.D. Cal.  
24 Apr. 6, 2012) (explaining that a failure to meet and confer is  
25 grounds for denying a motion, but still addressing the merits).

26 Medina's Motion to Compel states that the parties have "met  
27 and conferred including in person several times and reached an  
28 impasse as to the production of . . . records . . . ." (Pl.'s Mot.

1 Compel Attach. #1 Mem. P. & A. 2, ECF No. 99.) A disagreement  
2 emerged while they were engaged in discovery and were conducting  
3 depositions. The parties' efforts to resolve the discovery issues  
4 are confirmed in the declaration of Defendant Fenton's counsel of  
5 record, Michael Cayaban, submitted in support of Defendant's  
6 opposition:

7         Subsequent to service of plaintiff's document  
8 demands and prior to responses being provided, the  
9 parties did discuss that defendants would be asserting  
10 various objections and would not be producing all of the  
11 documents sought. As such, the parties attempted to come  
12 to some potential agreement on an efficient way to  
13 proceed and resolve the expected discovery dispute. The  
14 parties did agree to production of CHP policies pursuant  
15 to a protective order but came to no agreement regarding  
the production of other documents that defendants  
indicated would not be produced. The parties did discuss  
submitting a joint motion to the Court along with the  
documents that defendants were intending to withhold.  
However, it is my understanding from conversations with  
plaintiff's counsel that this Court would not allow the  
parties to proceed in this matter and would only resolve  
a discovery dispute pursuant to a regular noticed motion.

16 (Def's. Nava & Fenton's Joint Opp'n Attach. #2 Cayaban Decl. 2, ECF  
17 No. 105.) The same statement appears in the declaration of  
18 Defendant Nava's attorney Lee Roistacher. (Id. Attach. #1  
19 Roistacher Decl. 2.) These representations are consistent with  
20 Plaintiff's assertions.

21         Defendants Nava and Fenton argue that Plaintiff failed to meet  
22 and confer after receiving Defendants' objections. The parties met  
23 several times and were able to resolve several of the disputed  
24 issues and agree on a protective order [ECF No. 103]. Ultimately,  
25 this discovery motion followed. The Court agrees that it might  
26 have been prudent for Plaintiff to engage in another meet and  
27 confer session before bringing the Motion to Compel. Given these  
28 facts, however, the Court is satisfied that Plaintiff fulfilled her

1 requirement to meet and confer. The Court will decide Plaintiff's  
2 motion on the merits.

3 1. Document requests ten, twelve, thirteen, and sixteen  
4 to Defendant Nava

5 In document request number ten to Defendant Nava, Plaintiff  
6 asked for Nava's California Highway Patrol performance evaluations  
7 for the years 1996 through 2006. (Pl.'s Mot. Compel Attach. #2  
8 Decl. Acosta Ex. 8, at 3, ECF No. 99.) Nava objected to this  
9 request, stating that the documents are subject to privacy rights,  
10 the official information privilege, and are irrelevant. (Id. Ex.  
11 9, at 7.) Defendant also stated that no responsive documents exist  
12 prior to his hire date in November 2000, and that all performance  
13 evaluations for the 2000-2006 period were destroyed pursuant to  
14 CHP's document retention policy. (Id.)

15 Plaintiff also sought Nava's fitness for duty evaluations  
16 (request twelve) and workers compensation permanent and stationary  
17 return to work reports (request thirteen) from 1996 to present.  
18 (Pl.'s Mot. Compel Attach. #2 Decl. Acosta Ex. 8, at 4, ECF No.  
19 99.) Nava objected to both requests, stating that the documents  
20 are irrelevant and are protected by privacy rights. (Id. Ex. 9, at  
21 8.) He also stated that no responsive documents "exist or have  
22 ever existed." (Id.) Finally, in document request sixteen,  
23 Plaintiff sought records of discipline, reprimand or remedial  
24 training imposed on Nava as a result of the underlying incident "or  
25 any other act of false arrest, unlawful detention, unlawful search  
26 and seizure, use of excessive force, improper use of firearm,  
27 improper use of lethal force, false statement, false report or  
28 other improper action." (Pl.'s Mot. Compel Attach. #2 Decl. Acosta

1 Ex. 8, at 6, ECF No. 99.) Nava objected to the request as  
 2 overbroad, compound, and irrelevant as to documents after 2006.  
 3 (Id. Ex. 9, at 11.) Nevertheless, Defendant also stated that no  
 4 responsive documents "exist or have ever existed." (Id.)

5 In the joint opposition to Plaintiff's Motion, Defendants Nava  
 6 and Fenton reiterate that no responsive documents exist in  
 7 connection with Plaintiff's document requests number ten, twelve,  
 8 thirteen, and sixteen. (Defs. Nava & Fenton's Joint Opp'n 4, ECF  
 9 No. 105.) Defendants therefore argue that they cannot be compelled  
 10 to produce any documents in response to these requests. (Id.)

11 When responding to a request for production of documents under  
 12 Rule 34 of the Federal Rules of Civil Procedure, a party is to  
 13 produce all relevant documents in his "possession, custody, or  
 14 control." Fed. R. Civ. P. 34(a)(1). "This Court cannot compel the  
 15 production of documents that do not exist." Banks v. Beard, Civil  
 16 No. 3:CV-10-1480, 2013 U.S. Dist. LEXIS 99905, at \*6 (M.D. Pa. July  
 17 17, 2013); accord Myhre v. Seventh-Day Adventist Church Reform  
 18 Movement Am. Union Int'l Missionary Soc'y, 298 F.R.D. 633, 645  
 19 (S.D. Cal. 2014). "[W]hen a response to a production of documents  
 20 is not a production or an objection, but an answer, the party must  
 21 answer under oath." 7 James Wm. Moore et al., Moore's Federal  
 22 Practice, § 34.13[2][a], at 34-57 (footnote omitted). Similarly,  
 23 if a responding party contends that documents are not in its  
 24 custody or control, the court may require more than a simple  
 25 assertion to that effect. See id. § 34.14[2][a], at 34-72 to 34-73  
 26 (footnote omitted); see also Schwartz v. Mktg. Publ'g Co., 153  
 27 F.R.D. 16, 21 (D. Conn. 1994) (citing cases establishing that the  
 28

1 absence of possession, custody, or control of documents that have  
2 been requested must be sworn to by the responding party).

3 Defendant Nava's response to the requests for production was  
4 not provided under oath. The declaration from Lieutenant Mentink,  
5 the custodian of records for the California Highway Patrol's San  
6 Diego area office, discusses the CHP's file retention policy but  
7 does not explicitly state that the requested documents do not  
8 exist. (Defs. Nava & Fenton's Joint Opp'n Attach. #3, Mentink  
9 Decl. 2, ECF No. 105.) The Defendant failed to comply with the  
10 requirement that he state under oath that he lacks possession,  
11 custody, and control of documents requested under Rule 34.  
12 Accordingly, the Court GRANTS Plaintiff's Motion to Compel further  
13 responses to document requests number ten, twelve, thirteen, and  
14 sixteen to Defendant Nava.<sup>4</sup> He is ordered to produce the  
15 responsive documents or, in a properly executed response, attest  
16 that the documents do not exist and cannot be retrieved.

17 2. Document requests ten, twelve, thirteen, and sixteen  
18 to Defendant Fenton

19 Plaintiff's request number ten to Defendant Fenton contained a  
20 typographical error, seeking performance evaluations of Leo Nava  
21 instead of Fenton. (Pl.'s Mot. Compel Attach. #2 Decl. Acosta Ex.  
22 6, at 3-4, ECF No. 99.) Defendant Fenton objected on the ground  
23 that requested documents are protected by the right to privacy and  
24 official information privilege, and stated that the documents no  
25

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26 <sup>4</sup> Whether Defendants had a duty to suspend a document  
27 retention policy and implement a litigation hold is not before the  
28 Court at this time. See Apple Inc. v. Samsung Elecs. Co., Ltd.,  
881 F. Supp. 2d 1132, 1136-37 (N.D. Cal. 2012) (discussing duty to  
preserve evidence).

1 longer exist pursuant to CHP's file retention procedures. Fenton  
2 also responded that he "does not have possession, custody or  
3 control over Defendant Nava's training records." (Id. Ex. 7, at  
4 8.)

5 Plaintiff also sought Fenton's fitness for duty evaluations  
6 (request twelve), workers compensation permanent and stationary  
7 return to work reports (request thirteen), and discipline records  
8 (request sixteen). (Pl.'s Mot. Compel Attach. #2 Decl. Acosta Ex.  
9 6, at 4, 6, ECF No. 99.) In response, Defendant stated that no  
10 responsive documents exist. (Id. Ex. 7 at 9, 10, 13.) Defendant  
11 Fenton's responses suffer from the same defect as Defendant Nava's.  
12 Defendant did not properly attest to the fact that the responsive  
13 documents do not exist because they were purged. Similarly, the  
14 declaration from Lieutenant Recatto, the custodian of records for  
15 the Oceanside area office, discusses the CHP's file retention  
16 policy but does not explicitly state that the requested documents  
17 do not exist and cannot be retrieved. (Defs. Nava & Fenton's Joint  
18 Opp'n Attach. #4, Recatto Decl. 2, ECF No. 105.) The Defendant did  
19 not state under oath that he lacks possession, custody, and control  
20 of documents requested. Accordingly, Plaintiff's Motion to Compel  
21 further responses to document requests number ten, twelve,  
22 thirteen, and sixteen to Defendant Fenton is GRANTED. He is to  
23 produce the documents or, in an answer under oath, state that the  
24 documents do not exist and cannot be retrieved.

25 3. Document request eleven to Defendant Nava

26 In document request eleven to Nava, Plaintiff sought "[a]ll  
27 records relating to training received . . . and courses attended  
28 . . . for the years 1996 through 2006, including but not limited to



1 current P.O.S.T. certificate, status of mandatory P.O.S.T.  
2 training, firearms and qualification dates, scores and  
3 remediation." (Pl.'s Mot. Compel Attach. #2 Decl. Acosta Ex. 8, at  
4 4, ECF No. 99.) Nava responded that no documents exist prior to  
5 November 2000, his hire date, and that existing records are  
6 irrelevant, subject to privacy rights, and shielded by the official  
7 information privilege. (Id. Ex. 9, at 7.) Defendant also provided  
8 a privilege log listing three documents that had been withheld:  
9 (1) electronic training system print out; (2) training records from  
10 California Highway Patrol Employee's Training System Records System  
11 (AGO 615-628); and (3) Employment History (AGO 047-048). (Id. at  
12 7-8.)

13 In the joint opposition to Plaintiff's Motion, Defendants  
14 argue that Plaintiff Medina failed to establish that all training  
15 records are relevant to this case. (Defs. Nava & Fenton's Joint  
16 Opp'n 8, ECF No. 105.) Defendants point out that Medina does not  
17 allege a Monell cause of action against the CHP, and the request  
18 for all training records goes beyond the scope of Plaintiff's  
19 claims in this lawsuit. (Id.)

20 Defendant Nava, as the party opposing disclosure, has the  
21 burden to show that discovery should not be allowed. Oakes, 179  
22 F.R.D. at 283. He has not carried his burden of explaining and  
23 supporting his objections to the disclosure of his training  
24 records. See id. Defendant failed to produce any training  
25 records, invoking his right to privacy, official information  
26 privilege, and relevance. Cases relied on by Defendants Nava and  
27 Fenton in their joint opposition, nevertheless, ordered the  
28 production of training records relevant to the asserted claims.

1 See Robinson v. Adams, No. 1:08-cv-01380-AWI-SMS PC, 2011 WL  
2 2118753, at \*15 (E.D. Cal. May 27, 2011) ("Plaintiff has stated  
3 that his intention is to show that there is a habit and pattern of  
4 excessive force and therefore documents relating to training in use  
5 of force may be relevant."); Megargee v. Wittman, No. CV F 06 0684  
6 LJO WMW P, 2007 WL 2462097, at \*2-3 (E.D. Cal. Aug. 27, 2007)  
7 ("Plaintiffs are entitled to the relevant portions of the personnel  
8 files and training records, subject to a protective order.").  
9 Defendant does not argue which portions of his training records are  
10 irrelevant, or that producing all of Nava's training records is  
11 unduly burdensome.

12 Plaintiff's request for training records is not overbroad  
13 given the factual background of the case. The allegations against  
14 Defendant Nava include the use of excessive force, intent to  
15 inflict harm, and failure to intervene. Defendant's training  
16 records are relevant, and may lead to the discovery of additional  
17 information relevant to his on-duty conduct. Unger, 125 F.R.D. at  
18 70. Plaintiff's Motion to Compel the production of documents  
19 identified in document request number eleven to Defendant Nava is  
20 GRANTED.

21 4. Document request eleven to Defendant Fenton

22 Plaintiff's request number eleven to Defendant Fenton  
23 apparently contained a typographical error, seeking training  
24 records of Leo Nava instead of Fenton. (Pl.'s Mot. Compel Attach.  
25 #2 Decl. Acosta Ex. 6, at 3-4, ECF No. 99.) Defendant Fenton  
26 objected to the request, invoking privacy and official information  
27 privilege. (Id. Ex. 7, at 8.) Fenton also stated that he cannot  
28 comply with the request because he does not have "possession,

1 custody or control over Defendant Nava's training records." (Id.)

2 Plaintiff's typographical mistake in the document request  
3 served on Defendant Fenton does not excuse him from responding.  
4 JouJou Designs, Inc. v. JOJO Ligne Internationale, Inc., 821 F.  
5 Supp. 1347, 1350 (N.D. Cal. 1992) ("Although plaintiff could have  
6 taken greater care in preparing its papers, the issue is whether  
7 the defendant had 'actual notice' of the discovery request that  
8 could be imputed to him as a party despite the wrong name.")  
9 (citing Schiavone v. Fortune, 477 U.S. 21 (1986)).

10 Here, Plaintiff served almost identical sets of document  
11 requests on both Nava and Fenton. (Pl.'s Mot. Compel Attach. #2  
12 Decl. Acosta Ex. 6, ECF No. 99; id. Ex. 8.) Request numbers ten  
13 and eleven in each set named Defendant Leo Nava. Both sets were  
14 served on all counsel in this case. Moreover, in opposing the  
15 motion to compel, Defendants acknowledge that "[d]emand number 11  
16 propounded to both Nava and Fenton asked for Nava's training  
17 records between 1996 and 2006." (Defs. Nava & Fenton's Joint Opp'n  
18 4, ECF No. 105.) There is little doubt that Plaintiff intended to  
19 seek both Nava's and Fenton's records in discovery. Instead of  
20 extending professional courtesy to Plaintiff's counsel and  
21 clarifying the requests, Defendant Fenton responded to request  
22 eleven as if Plaintiff intended to request Nava's records from  
23 Fenton. Furthermore, Fenton's counsel apparently did not raise  
24 this concern during the attorneys' discovery conferences.

25 In their joint opposition to Plaintiff's Motion to Compel,  
26 Defendants do not raise the privacy or official information  
27 privilege arguments; Fenton merely contends that he does not have  
28 custody or control over Nava's training records. When ruling on a

1 motion to compel, a court "generally considers only those  
2 objections that have been timely asserted in the initial response  
3 to the discovery request and that are subsequently reasserted and  
4 relied upon in response to the motion to compel." Calderon v.  
5 Experian Info. Solutions, Inc., 290 F.R.D. at 516 n.4 (citation  
6 omitted). "[W]hen an objection or privilege is initially raised  
7 but not relied upon in response to the motion to compel, the court  
8 will deem the objection or privilege waived." 10A John Kimpflen,  
9 J.D., et al., Federal Procedure, Lawyers Edition § 26:778 (2013)  
10 (citing Sonnino v. Univ. Kansas Hosp. Auth., 220 F.R.D. 633, 642  
11 (D. Kan. 2004)).

12 Plaintiffs have alleged that Defendant Fenton's actions were  
13 in the course of his duties as a CHP officer. (Consolidated Compl.  
14 4, ECF No. 57.) They claim that each Defendant's conduct while on  
15 duty was unlawful. (Id.) Specifically, Plaintiffs contend that  
16 during the vehicle pursuit, Fenton falsely reported an assault with  
17 a deadly weapon with the intent to harass, harm, or retaliate  
18 against Robert Medina for his failure to stop. (Id. at 8.) They  
19 also point to Defendant Fenton's statement -- "Let's end this.  
20 Let's end this." -- as further proof of a retaliatory motive. (Id.  
21 at 8-9.) Plaintiffs argue that Fenton's use of deadly force was  
22 unjustified because the physical evidence refutes his account of  
23 the events. (Id. at 14.) Given these allegations, Defendant  
24 Fenton's training records are relevant and should be produced for  
25 the same reasons as those outlined earlier in connection with  
26 Defendant Nava. The Court GRANTS Plaintiff's Motion to Compel  
27 production of documents requested in document request number eleven  
28 to Defendant Fenton.

1                   5.     Document requests fourteen to Nava and Fenton

2             In separate document requests, Defendants Nava and Fenton are  
3 asked to produce "[a]ll reports, interviews, witness statements,  
4 diagrams, photographs, investigative summaries or any other  
5 document or audio or visual recording made as a result of any  
6 investigation (internal affairs or otherwise) by the State of  
7 California and/or California Highway Patrol into the INCIDENT  
8 . . . ." (Pl.'s Mot. Compel Attach. #2 Decl. Acosta Ex. 6, at 4,  
9 ECF No. 99; id. Ex. 8 at 4.) In response, each Defendant stated  
10 that although the CHP was not the "lead investigatory agency  
11 involved in the November 16, 2016 incident," it conducted an  
12 administrative review of the incident and generated an "Officer  
13 Involved Shooting Reconstruction Report." (Id. Ex. 7, at 10-11;  
14 id. Ex. 9, at 8-9.) Nava and Fenton objected to the production of  
15 several documents in the Report, invoking the official information  
16 privilege, right to privacy, attorney-client privilege, and  
17 attorney work product. (Id. Ex. 7, at 3; id. Ex. 9, at 9-10.)

18             In opposing Plaintiff Jennifer Medina's Motion to Compel,  
19 Defendants allege that they produced over 1200 pages of non-  
20 privileged material generated in the administrative review of the  
21 incident. (Defs. Nava & Fenton's Joint Opp'n 8, ECF No. 105.)  
22 They claim they withheld the following documents: (1) June 27,  
23 2008 Memorandum Of Findings - Policy And Procedure Review of  
24 Officer Involved Shooting (Nava), numbered AGO 1-7, 642-49; (2) May  
25 14, 2008 Memorandum Of Findings - Policy And Procedure Review of  
26 Officer Involved Shooting (Fenton), numbered AGO 8-10, 629-41; (3)  
27 April 11, 2008 Memo to Office Of General Counsel, unnumbered; (4)  
28 Vehicle Accident Report, numbered AGO 394-98, undated; (5)

1 Employment Histories, numbered AGO 432-47, undated; (6) November  
2 15, 2006 Daily Incident Logs, numbered AGO 592-94, (7) Training  
3 Records from California Highway Patrol Employees Training Records  
4 System, numbered AGO 600-11 (Fenton), 615-628 (Nava)); and (8)  
5 Officer Safety Certification, numbered AGO 597-99 (Fenton), 613-14  
6 (Nava)). (Id.; Pl.'s Mot. Compel Attach. #2 Decl. Acosta Ex. 9, at  
7 9-10.)

8 Nava and Fenton argue that Plaintiff would "gain nothing  
9 through the disclosure of such personnel documents," because  
10 "Defendants have already produced over 1200 pages of documents  
11 relating specifically to this incident, including the San Diego  
12 County Sheriff's Office Homicide Investigation and all but 50 pages  
13 of the CHP's Officer Involved Shooting Administrative review."  
14 (Defs. Nava & Fenton's Joint Opp'n 10, ECF No. 105.) At the same  
15 time, Defendants allege that the disclosure of withheld documents  
16 would have a "chilling effect on the open-exchange of information  
17 and would discourage frank and open discussions regarding CHP's  
18 internal policies, and would lead to an environment that is less  
19 safe for officers and the public." (Id.) Nava and Fenton argue  
20 that the Plaintiff fails to show the relevance of the withheld  
21 items. (Id. at 8.) They also claim that the information in the  
22 documents was "already disclosed through written discovery or  
23 depositions." (Id. at 10.)

24 In support of their asserted privileges, Defendants submitted  
25 declarations from CHP Lieutenant Karyn Mentink, custodian of  
26 records for the San Diego Area, and CHP Lieutenant Peter Recatto,  
27 custodian of records for the Oceanside Area. (Defs. Nava &  
28 Fenton's Joint Opp'n Attach. #3 Mentink Decl., ECF No. 105; id.

1 Attach. #4 Recatto Decl.) Both declarants state that "[d]isclosure  
2 of material subject to a protective order will not suffice."

3 (Defs. Nava & Fenton's Joint Opp'n Attach. #3 Mentink Decl. 4, ECF  
4 No. 105; id. Attach. #4 Recatto Decl. 4.)

5 It will be abundantly clear, for example, to witnesses  
6 that the statements made by them, allegedly in confidence  
7 to CHP, were not truly confidential. In addition, the  
8 privacy interests of those persons discussed in the work  
9 product, for example, peace officers with personnel  
records, will not be adequately protected; their interest  
is harmed when the information is disclosed. Finally,  
the ability of CHP to engage in objective self-critical  
analysis will have been highly compromised.

10 (Defs. Nava & Fenton's Joint Opp'n Attach. #3 Mentink Decl. 4, ECF  
11 No. 105; id. Attach. #4 Recatto Decl. 4.)

12 In order to properly invoke the official information  
13 privilege, the affidavit or declaration must be submitted by "a  
14 responsive official within the agency who has personal knowledge of  
15 the principal matters to be attested to in the affidavit or  
16 declaration." Hampton, 147 F.R.D. at 230 (quoting Kelly, 114  
17 F.R.D. at 669). Among other things, the agency official must  
18 specify the governmental or privacy interests that would be  
19 threatened by disclosure. Id.

20 [T]he affiant must have personal knowledge of the  
21 principal matters covered by the affidavit. The  
22 requirement of personal knowledge . . . is important  
23 because the most reliable information will come from  
people with direct knowledge about what interests are  
threatened by a particular disclosure and how much harm  
to those interests is likely.

24 Kelly, 114 F.R.D. at 669-70. Mere familiarity with CHP policies  
25 and procedures is insufficient. "It would suffice, for example,  
26 for the affidavit to be provided by the head of the internal  
27 affairs unit, or by a person with some relevant supervisory or  
28 policy making role." Id. at 669. Defendants failed to meet the

1 threshold burden because the declarations do not establish that the  
2 two custodians of records have personal knowledge of the  
3 governmental or privacy interests that may be implicated by  
4 disclosure of the requested documents or that the declarants'  
5 responsibilities make them qualified to describe how disclosure  
6 subject to a protective order would create a substantial risk of  
7 harm to those interests or to project how much harm would result.  
8 See Hampton, 147 F.R.D. at 230-31.

9 Defendants argue that witness statements to CHP must remain  
10 "truly confidential." But "'a general assertion that a police  
11 department's internal investigatory system would be harmed by  
12 disclosure of the documents is insufficient' to meet the threshold  
13 test for invoking the official information privilege." Soto, 162  
14 F.R.D. at 614 (quoting Chism, 159 F.R.D. at 534-35).

15 Nava and Fenton maintain that the agency's self-critical  
16 analysis will suffer from disclosure of the records, but the Ninth  
17 Circuit does not recognize this privilege. Branch v. Umphenour,  
18 2014 WL 3891813, at \*7; Soto, 162 F.R.D. at 611. Defendants'  
19 claims regarding the chilling effect disclosure of these documents  
20 would have are likewise unpersuasive.

21 [T]here is no empirical support for the contention that  
22 the possibility of disclosure would reduce the candor of  
23 officers who contribute to internal affairs  
24 investigations, and since there are solid reasons to  
25 believe that that possibility might have the opposite  
effect (improving accuracy and honesty), there is no  
justification for offering near absolute protection to  
the statements that go into such reports or to the  
opinions and recommendations that conclude them.

26 Kelly, 114 F.R.D. at 665-66 (stating that internal affairs  
27 investigations are "presumptively discoverable"); see also Price v.  
28 Cnty. of San Diego, 165 F.R.D. 614, 620 (S.D. Cal. 1996) ("[T]he



1 Court is convinced that the infringement upon the frank and  
2 independent discussions regarding contemplated policies and  
3 decisions of the County . . . , caused by disclosure of these  
4 documents, can be alleviated through the use of a strict protective  
5 order against use or dissemination of the materials outside of this  
6 lawsuit." ).

7 Defendants asserted the attorney-client privilege to avoid  
8 disclosing two documents that appear to be part of an "Officer  
9 Involved Shooting Reconstruction Report"; however, for Nava and  
10 Fenton, the privilege has not been established. See In re Excel  
11 Innovations, Inc., 502 F.3d 1086, 1099 (9th Cir. 2007)  
12 ("Ordinarily, the party asserting attorney-client privilege has the  
13 burden of establishing all of the elements of the privilege."); In  
14 re Spalding Sports Worldwide, Inc., 203 F.3d 800, 805 (Fed. Cir.  
15 2000) ("[T]he central inquiry is whether the communication is one  
16 that was made by a client to an attorney for the purpose of  
17 obtaining legal advice or services." ).

18 Defendants claimed that attorney-client privilege protects (1)  
19 a memo to the office of general counsel dated April 11, 2008, and  
20 (2) an undated vehicle accident report. (Pl.'s Mot. Compel Attach.  
21 #2 Decl. Acosta Ex. 9, at 9-10, ECF No. 99.) Nava and Fenton fail  
22 to identify the author(s) of each document; the recipients; the  
23 reason(s) each document was created; and whether each individual  
24 has an attorney-client relationship with any author, recipient, or  
25 other interested party. Nothing in the record shows the existence  
26 of an attorney-client relationship, that the documents at issue are  
27 communications made to seek legal advice, or that they were  
28 intended to be confidential. See Martin, 278 F.3d at 1000. To the

1 extent Defendants argue that the vehicle accident report is also  
 2 protected as attorney work product, they have failed to show that  
 3 the report "would not have been generated but for the pendency or  
 4 imminence of litigation." Kintera, Inc. v. Convio, Inc., 219  
 5 F.R.D. 503, 507 (S.D. Cal. 2003) (discussing fact work product).

6 In sum, the Court rejects Defendants' objections on the basis  
 7 of official information privilege, attorney work product, and  
 8 attorney-client privilege. The information included in the  
 9 administrative review of the shooting is clearly relevant.  
 10 Plaintiff's need for the information contained in the Officer  
 11 Involved Shooting Reconstruction Report outweighs Defendants'  
 12 privacy rights, and is unlikely to be available from any other  
 13 source. Soto, 162 F.R.D. at 617 & n.8 (rejecting defense counsel's  
 14 statements that comparable information can be obtained through  
 15 interrogatories or depositions). Plaintiff's Motion to Compel  
 16 production of documents sought in document requests fourteen to  
 17 Defendants Nava and Fenton is GRANTED.

18 6. Document request fifteen to Defendants Nava and Fenton

19 Document request number fifteen to Defendant Fenton asks that  
 20 he produce the following items:

21 All reports of complaints or internal affairs  
 22 investigations conducted alleging or relating to false  
 23 arrest, unlawful detention, unlawful search or seizure,  
 24 excessive force, improper use of firearm, improper use of  
 25 lethal force, false reports, false statements, untruthful  
 or other improper procedures by Defendant TIMOTHY FENTON  
 for the years 1996 to the present, and the investigation  
 of said complaints, including, but not limited to:

26 a) the full investigation of each complaint or  
 27 investigation, including all statements (written,  
 28 audio or video recordings) of all participants and  
 witnesses;

1 b) the names, addresses and telephone numbers of the  
2 persons who filed the complaints or generated the  
3 investigation and any statements (written, audio or  
4 video recordings) they provided;

5 c) the names, address and telephone numbers of all  
6 persons, whether law enforcement officers or private  
7 persons, who were percipient witnesses to the events  
8 which gave rise to the filing of the complaints or  
9 generation of the investigation, and any statement  
10 (written, audio or video recordings) each such  
11 person provided;

12 d) the written reports of the investigation of these  
13 complaints or investigations, including complaints  
14 which may have been determined to be unsustainable;  
15 and

16 e) verbatim copies of all other records, reports,  
17 notes, photographs and audio or video recordings  
18 made as a result of the law enforcement agency's  
19 investigation of the complaints.

20 As to all items requested, Plaintiffs request the  
21 information be furnished regardless of the outcome,  
22 disposition or result of the complaint, report or  
23 investigation.

24 (Pl.'s Mot. Compel Attach. #2 Decl. Acosta Ex. 6, at 4-5, ECF No.  
25 99.) Medina sought the same records from Defendant Nava. (Id. Ex.  
26 8, at 4-5.)

27 Defendant Fenton objected to the request as overbroad, vague,  
28 and irrelevant. (Id. Ex. 7, at 12.) He also invoked right to  
privacy, state law privileges, and the official information  
privilege. (Id.) Fenton stated that pursuant to CHP's file  
retention policy, all documents related to citizen complaints are  
destroyed after five years, and all memoranda of findings or  
investigations that do not result in employee discipline are  
destroyed after three years. (Id.)

Fenton's response also indicated that two documents were  
withheld: (1) a citizen's complaint about an incident that  
occurred on October 18, 2013, involving the validity of a stop and

1 the driving of a patrol vehicle; and (2) a citizen's complaint  
2 about a November 18, 2012 incident involving discourtesy. (Id.)  
3 Medina sought complaints "relating to false arrest, unlawful  
4 detention, unlawful search or seizure, excessive force, improper  
5 use of firearm, improper use of lethal force, false reports, false  
6 statements, untruthful or other improper procedures." (Pl.'s Mot.  
7 Compel Attach. #2 Decl. Acosta Ex. 6, at 4, ECF No. 99.) Unless  
8 these two withheld items relate to the type of misconduct alleged  
9 in this case, they are not relevant to the claims or defenses and  
10 are unlikely to lead to discovery of admissible evidence. See Fed.  
11 R. Civ. P. 26(b)(1). Furthermore, the incidents post-date the  
12 events that are the subject of this suit by more than six years.  
13 Finally, the Plaintiffs are not asserting a Monell claim against  
14 the California Highway Patrol. For all these reasons, the withheld  
15 documents are not responsive to document request fifteen.  
16 Accordingly, the Court DENIES Plaintiff's Motion to Compel with  
17 regard to these two documents.

18       It is not clear from Fenton's statements, however, whether  
19 responsive documents for the time period prior to 2012 ever existed  
20 or if they were destroyed pursuant to CHP's policies. Regardless,  
21 Fenton did not provide an answer under oath that no documents exist  
22 prior to 2012. As discussed earlier, "when a response to a  
23 production of documents is not a production or an objection, but an  
24 answer, the party must answer under oath." 7 James Wm. Moore et  
25 al., Moore's Federal Practice, § 34.13[2][a], at 34-57 (footnote  
26 omitted); see also Schwartz, 153 F.R.D. at 21. The Court GRANTS in  
27 part Plaintiff's Motion to Compel a further response under oath to  
28

1 document request number fifteen to Defendant Fenton to address the  
2 existence of documents for the time period from 1996 to 2012.

3 Defendant Nava objected to Plaintiff's request for production  
4 number fifteen as overbroad and irrelevant, and invoked the right  
5 to privacy and official information privilege. (Id. Ex. 9, at 11.)  
6 He also stated that no responsive documents exist, or have ever  
7 existed, for the time period between 2000-2006. (Id.) Nava's  
8 response was likewise not given under oath. The declaration from  
9 Lieutenant Mentink, the custodian of records for the San Diego  
10 area, discusses the CHP's file retention policy but does not  
11 explicitly state that the requested documents do not exist. (Defs.  
12 Nava & Fenton's Joint Opp'n Attach. #3, Mentink Decl. 2, ECF No.  
13 105.) The Defendant failed to state under oath that he does not  
14 possess, control, or have custody of the documents requested.  
15 Accordingly, the Court GRANTS in part Plaintiff's Motion to Compel  
16 a further response to document request number fifteen to Defendant  
17 Nava to address the existence of documents for the time period from  
18 2000 to 2006.

19 Defendant Nava also stated that he withheld one document -- a  
20 citizen's complaint regarding a traffic citation dated September  
21 2010. (Pl.'s Mot. Compel Attach. #2 Decl. Acosta Ex. 9, at 11, ECF  
22 No. 99.) The traffic citation appears to have no bearing on the  
23 issues in this case and post-dates the events in this suit.  
24 Therefore, the document need not be produced. The Motion to Compel  
25 is DENIED as to this document.

26 Because the Court GRANTS Plaintiff's Motion to Compel further  
27 responses to document requests number fifteen, Defendants Fenton  
28 and Nava are ordered to provide Plaintiff a properly executed

1 response, attesting under oath that the documents do not exist for  
2 the stated time period. Alternatively, responsive documents should  
3 be produced.

### 4 **III. CONCLUSION**

5 For the reasons above, the Court GRANTS in part and DENIES in  
6 part Plaintiff's Motion to Compel [ECF No. 99]. All documents  
7 ordered produced are to be provided to Plaintiff by October 10,  
8 2014, and all further responses that are to be made under oath are  
9 also due by October 10, 2014. Documents are to be produced  
10 pursuant to a protective order limiting use and dissemination of  
11 the items. The limited protective order already on file in the  
12 case [ECF No. 103] may serve as a model for a further stipulated  
13 order.

14 As to Defendant San Diego County, the Court GRANTS Plaintiff's  
15 Motion to Compel as follows:

16 (1) Defendants Ritchie and Taft's performance evaluations and  
17 training records for the time period of 1996 through 2006 (document  
18 requests 10, 11, 12, & 13) are to be produced;

19 (2) Defendants Ritchie and Taft's fitness for duty evaluations  
20 and return to work reports for the years 1996 to the present  
21 (document requests 14, 15, 16, & 17) are to be produced;

22 (3) The records related to the investigation of the shooting  
23 death of Robert J. Medina (document request 18) are to be produced;

24 (4) Internal affairs reports and investigations of other  
25 incidents or complaints pertaining to Ritchie and Taft for the  
26 period 1996 to present (document requests 19 & 20) are to be  
27 produced;

28

1 (5) Defendants Ritchie and Taft's discipline and reprimand  
2 records relating to the shooting incident (document requests 21 &  
3 22) are to be produced;

4 (6) Records of Civil Service Commission proceedings (document  
5 requests 24 & 25) are to be produced, or Defendant San Diego County  
6 must provide responses under oath explaining what efforts it  
7 undertook to obtain responsive documents; and

8 (7) Critical Review Reports related to the shooting incident  
9 (document request 26) are to be produced.

10 As to Defendants Leo Nava and Timothy Fenton, the Court GRANTS  
11 in part and DENIES in part Plaintiff's Motion to Compel:

12 (1) Defendant Nava and Fenton's performance evaluations,  
13 fitness for duty evaluations, workers compensation return to work  
14 reports, and discipline records (document requests 10, 12, 13, &  
15 16) are to be produced. Alternatively, for each answer that  
16 responsive documents do not exist, the Defendant must provide  
17 responses under oath explaining what efforts he undertook to obtain  
18 responsive documents;

19 (2) Nava and Fenton's training records (document requests 11)  
20 are to be produced;

21 (3) Defendants Nava and Fenton are to produce all reports and  
22 records pertaining to the shooting incident (document requests 14);

23 (4) For document requests fifteen, Defendant Nava is not  
24 required to produce withheld documents relating to a citizen's  
25 complaint concerning a 2010 traffic citation. Defendant Fenton is  
26 not required to produce withheld documents relating to two  
27 citizens' complaints - one in 2012 and the other in 2013. For  
28 other documents that are or may be responsive to document request

1 fifteen, Defendant Fenton is to produce the documents from 1996 to  
2 the present or, for any documents that no longer exist, provide  
3 responses under oath explaining what efforts he undertook to obtain  
4 the responsive documents. Likewise, Defendant Nava is to produce  
5 responsive documents from 2000 to the present or provide responses  
6 under oath explaining, for any documents that no longer exist, what  
7 efforts he undertook to obtain the responsive documents.

8 Finally, there are personnel records that Plaintiff has not  
9 addressed in her motion, e.g. sheriff identification cards, photos,  
10 personal identifying information (home address, badge receipts, and  
11 other personal data). As to these withheld items, Plaintiff has  
12 not moved to compel their production, and they are not the subject  
13 of this Order.

14  
15 Dated: September 25, 2014

  
RUBEN B. BROOKS  
United States Magistrate Judge

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18 cc: All Parties of Record  
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